No. 94-1437

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CONOPCO, INC. D/B/A CHESEBROUGH-POND'S USA CO.,

Petitioner,

—v.—

MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, and KESSLER CONTAINERS, LTD.,

Respondents.

REPLY BRIEF OF PETITIONER CONOPCO, INC. D/B/A CHESEBROUGH-POND'S USA CO.

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6 pp

TABLE OF CONTENTS

PAGE

I. Contrary to May/Venture's Argument, Other Skin Care Lotion Products Manufactured And Packaged By Respondent Ansehl Were Enjoined By The District Court 2

II. Venture Used Its Name Prominently On Skin Care Lotion Packaging For Four Years Before Introducing Its "Revised" Packaging 3

III. Conclusion 4

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REPLY BRIEF OF PETITIONER CONOPCO, INC. D/B/A CHESEBROUGH-POND'S USA CO.

Conopco, Inc. d/b/a Chesebrough-Pond's USA Co. ("Chesebrough") submits this reply brief in response to the brief of May Department Stores Company ("May") and Venture Stores Inc. ("Venture") in opposition to Chesebrough's Petition for a Writ of Certiorari ("the May/Venture Opposition") and in response to the Amendment to the May/Venture Opposition filed on March 30, 1995 ("the May/Venture Amendment").

The purpose of this reply brief is to correct two factual misstatements contained in the May/Venture Opposition. Although these misstatements go to the merits of the case, due to their serious nature, Chesebrough is compelled to submit corrections herein, before the Court's consideration of Chesebrough's Petition.

I. Contrary to May/Venture's Argument, Other Skin Care Lotion Products Manufactured And Packaged By Respondent Ansehl Were Enjoined By The District Court

May/Venture allege that Chesebrough has "agreed" that the trade dress of the three skin care lotion packages pictured on pages 6 and 7 of the May/Venture Opposition are not infringing. (May/Venture Opp., 6). This contention is untrue. These three products (Target, Ames, and "Enriched") were manufactured and packaged by defendant/respondent The Benjamin Ansehl Company ("Ansehl"). Each of these products was an exhibit at trial, was admitted into evidence, and *was subject to the injunction entered by the District Court on January 2, 1992*. After entry of the injunction, the labels for these three products (and others manufactured by Ansehl) were redesigned and submitted by Ansehl to Chesebrough for its approval, *in order to comply with the injunction*. (See text of Injunction at App. B to Petition, 92a).

In addition, May/Venture's contention disregards the District Court's Finding of Fact No. 48, undisturbed by the Federal Circuit, that the Ames, Target and additional skin care lotion products manufactured by Ansehl for other retailers "are packaged in containers which mimic the shape and appearance of the [VASELINE INTENSIVE CARE lotion] bottle . . . including the yellow, blue and green color combination of the [VASELINE INTENSIVE CARE lotion] packaging." (See App. B to Petition, 41a). Thus, May/Venture's argument that these three products are admitted to be non-infringing is an outright mischaracterization of the record and, Chesebrough respectfully requests that this argument be disregarded.

II. Venture Used Its Name Prominently On Skin Care Lotion Packaging For Four Years Before Introducing Its "Revised" Packaging

The May/Venture Amendment itself is also misleading. The Amendment indicates that the Venture label pictured in the photograph on the left (which displays Venture's name) was used by Venture between March 1989 and January 1990. This is misleading because it creates the misimpression that prior to March of 1989, the only label used by Venture for its skin care lotion was the one pictured on the right, which does not include its name. However, as the Declaration of Kip L. Bowers establishes[1], a virtually identical label to the one pictured on the left[2] *containing prominent display of Venture's name*, was used by Venture from January 1986 to March 1989. (See p. G-7 of the Appendix to the May/Venture Amendment).

As the District Court found, "Mr. Bowers admitted that the Venture name was prominently displayed on Venture's skin care lotion packaging for the past four years." (Finding of Fact No. 64, App. B to Petition, 44a). This is important, because the Federal Circuit's decision means that a store brand competitor may copy the protectible trade dress of a national brand, may *omit its store name* from the label and may *use the national brand's registered trademarks prominently*, and still be within the bounds of lawful conduct

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[1] Kip Bowers is the Ansehl designer who designed the labels for Venture's Skin Care lotion products. A declaration by him was submitted to the District Court, admitted into evidence at trial and was attached by May/Venture as an Appendix to their Amendment.

[2] The only difference was that the top panel read "25% MORE FREE" instead of "33% MORE FREE".

under the Lanham Act. As set forth in Chesebrough's Petition, such a holding is unprecedented in any circuit.

III. Conclusion

Based upon the reasons set forth in its Petition for *Certiorari*, as well as on the arguments set forth in the briefs *amicus curiae* of International Trademark Association, SmithKline Beecham, American Home Products Corporation/Nabisco, Inc., Gerstman + Meyers, Inc./ Wallace Church Associates, Inc. and Bristol-Myers Squibb Company, Chesebrough respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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